

# ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR08-1072

DALE FITZGERALD,

APPELLANT

V.

STATE OF ARKANSAS,

APPELLEE

**Opinion Delivered** 27 MAY 2009

APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT,  
[NO. CR-2007-100-G]

THE HONORABLE J. MICHAEL  
FITZHUGH, JUDGE

AFFIRMED

**D.P. MARSHALL JR., Judge**

Both lawyers told the circuit court that one issue in this revocation case boiled down to he said/she said. Dale Fitzgerald, the appellant, said that he left Tasha Griffith this voicemail on her cell phone: “[I]f anybody gets Stacey”—Fitzgerald’s ex-wife with whom he was trying to reconcile—“any dope or gets her back on dope I will whip their butt.” Griffith said that Fitzgerald’s voicemail was different. According to her, this was the message: “Tasha, this is Dale. You need to tell Stacey to call me. I am headed over there to kill you and your family because she is not speaking to me.” The circuit court revoked Fitzgerald’s suspended sentence for making a threatening phone call and not paying fines and court costs.

We affirm the revocation. Whom to believe was the circuit court’s call after

seeing and hearing the witnesses. *Billings v. State*, 53 Ark. App. 219, 223, 921 S.W.2d 607, 609 (1996). Fitzgerald attacks Griffith's version of the message. He emphasizes these points: The voicemail was not played for the circuit court; the State did not offer any testimony from the police officer for whom Griffith allegedly played the message; and Griffith had a motive to lie. But these are all matters of Griffith's credibility and the weight of her testimony. If the circuit court believed Griffith's version—a death threat, then Fitzgerald's words constituted terroristic threatening. Ark. Code Ann. § 5-13-301(a)(1)(A) (Repl. 2006). Even if the court believed Fitzgerald's version, his words threatened physical harm, which satisfied the statute and supported revocation. Ark. Code Ann. § 5-13-301(b)(1).

Fitzgerald also contends that the State did not prove that his threat left Griffith fearful or in immediate danger. The statute does not require either one. Whether the voicemail was as he said or she said, Fitzgerald made a terroristic threat. This violation of one of the terms of Fitzgerald's suspended sentence justified revocation. *Rudd v. State*, 76 Ark. App. 121, 124, 61 S.W.3d 885, 888 (2001); Ark. Code Ann. § 5-4-309(d) (Repl. 2006).

Affirmed.

HENRY, J., agrees.

PITTMAN, J., concurs.

